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IN THE

Supreme Court of the United States

No. 947 October Term, 1957

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, Mayor of the City of Philadelphia, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST and ROBERT FELDER,

Appellants

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA and THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, DECEASED,

Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY JURISDICTIONAL STATEMENT OF COMMONWEALTH OF PENNSYLVANIA, APPELLANT

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REPLY JURISDICTIONAL STATEMENT OF COMMONWEALTH OF PENNSYLVANIA, APPELLANT

1. THE REMOVAL OF THE CITY AS TRUSTEE RAISES A FEDERAL QUESTION

Appellees argue that the appellants are merely appealing the denial to Negro applicants of admission to Girard College. All of the appellants, however, assert that the removal of the public trustee by the Orphans' Court raises a federal question.[1] Under Pennsylvania law, pursuant to the Fiduciaries Act of 1949, the Orphans' Court is empowered to remove a trustee when "the interests of the estate are likely to be jeopardized by his continuance in office". To use this power in order to withdraw from the ambit of the Fourteenth Amendment a school, which has been administered by the City of Philadelphia for over a century in conformity with the Will of the testator and the numerous express mandates of the Pennsylvania legislature, and

[1] The other questions raised by appellee's brief: namely, 1. the drawing into question of the Pennsylvania Fiduciaries Act of April 18, 1949; 2. the bypassing and foreclosing of the rights of the United States under the Will of Stephen Girard; and 3. the public attributes of Girard College by reason of administration by the City of Philadelphia, the extensive and necessary implementing legislation, the ancillary duties of the City mandated by the Will and the legislature with respect to the College and the Orphans, and the indirect use of public funds (not tax exemption) have been discussed in the Jurisdictional Statement filed by all Appellees.

which has already been adjudicated by this court to be subject to the restrictions and limitations of the Fourteenth Amendment raises a substantial federal question.

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2. THE COMMONWEALTH IS A NECESSARY AND INDISPENSABLE PARTY

The Commonwealth has been a party to this litigation since its inception in 1954. Counsel for the Thirteen Substituted Trustees of the Estate of Stephen Girard, deceased, now questions the standing of the Commonwealth of Pennsylvania in this case.[2] The Orphans' Court in this case sustained the standing of the Attorney General. 4 Pa. D. & C. 671, 718, fn. 3. Indeed, the Attorney General appeared at the express suggestion of the learned hearing judge.

The Supreme Court of Pennsylvania has unequivocally declared that in all cases involving charitable trusts, the Attorney General is a necessary and indispensable party. *Garrison's Estate*, 391 Pa. 234 (1958), *Pruner's Estate*, 390 Pa. 529 (1957). In both of these cases, the trustees were purely private parties and

[2] The standing of the Thirteen Substituted Trustees is certainly open to question. A stay is in effect and the Board of City Trusts is now continuing to administer the Estate and the College. The Substituted Trustees have appeared without permission of the Court and without filing a petition for leave to intervene. They are not a party to this action. It is anomalous that these private individuals who have no interest or standing should presume to question the right of the Commonwealth to appear in this litigation in which it is a necessary and indispensable party.

yet the presence of the Attorney General as a party to the proceedings was required. The formal representation of the Commonwealth in all charitable trusts is necessary and desirable so that the public, which is the real beneficiary of the settlor's generosity, may be represented and that interest be protected. See *Bogert, Proposed Legislation Regarding State Supervision of Charities*, 52 Mich. L. R. 633 (1954); *Forer, Forgotten Funds*, 105 U. Pa. L. R. 1044 (1957).

The role of attorney general in the supervision of charitable trusts has a long and honorable history. The monarchs of England in the Tudor period had general superintendence over charitable uses. In performing such functions, the king acted through the attorney general.

According to Blackstone,

> "The king, as parens patriae, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney general, at the relation of some informant (who is usually called the relator) files ex officio an information in the court of chancery to have the charity properly established." 3 *Blackstone, Commentaries*, Sec. 427. See *Attorney General v. Mayor*, 1 Bll. n. s. 312, 4 Eng. Rep. 888 (1827); *Eyre v. Countess*, 2 Will. P. 103, 119, 24 Eng. Rep. 659, 664 (1722).

The right and duty of the crown to supervise the administration of charitable trusts which was an accepted principle of law in the sixteenth century was clarified by the Statute of Uses. With the Reception, this practice was adopted as part of the common law

of the United States. *Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs.*, 17 U. S. (4 Wheat.) 1 (1819).

In other American jurisdictions where the problem has arisen, the courts have without exception held that the Attorney General is a necessary party in any litigation involving charitable trusts. *Thatcher v. St. Louis*, 343 Mo. 597, 122 S. W. 2d 915 (1938); *Trustees of Rutger's College v. Richman*, 41 N. J. Super. 259, 125 A. 2d 10 (Ch. 1956); *Passaic Nat'l Bank & Trust Co. v. East Ridgelawn Cemetery*, 137 N. J. Eq. 603, 45 A. 2d 814 (Ch. 1946); *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A. 2d 682 (1950); *Watson v. Wall*, 228 S. C. 500, 93 S. E. 2d 918 (1956).

The removal of the City of Philadelphia as trustee affects not only the two applicants for admission to Girard College but also the entire population of Philadelphia, Negro and White. The administration of this College like the administration of the library, the Art Museums, and other educational institutions involves the public as a whole, not merely those individuals who make use of the several institutions. Further, this Court has cited with favor these authorities who recognize that segregated educational institutions affect adversely the White as well as the Negro citizens. *Brown v. State Board of Education*, 347 U. S. 483, 494 Fn. 11 (1954). Therefore, in order to represent the totality of the public and in the proper exercise of the duties of his office to require that charities are administered in accordance with the laws of the Commonwealth of Pennsylvania and of the United States, the Attorney General is a necessary and indispensable party.

3. THE REMOVAL OF THE CITY VIOLATES THE RIGHTS OF THE TESTATOR, THE CITY AS TRUSTEE, AND THE PUBLIC

Appellees lay great stress upon the opinion of the Pennsylvania Supreme Court in *Brown et al. v. Hummell et al.*, 6 Pa. 86 (1847). We submit that the cited case is clear authority for the proposition that the Orphans' Court may not remove the City as trustee and establish an entirely new method of selecting trustees and administering the College. In the cited case, the legislature had passed an act altering the method of selection of trustees for an orphan home established by will. The Pennsylvania Supreme Court pointed out that a "private" charity was involved and held that the legislature could not alter a will. Note that the alteration was a slight one, merely changing the method of selection of private trustees, not a drastic metamorphosis in the nature of the trust from public to private. Nevertheless, the Pennsylvania Supreme Court held that the legislature could not change the designation of trustees which the testator had made. The court further held that to deprive the trustees of their rights and to deprive the beneficiaries of the benefit of the trusteeship of the responsible persons selected by the testator without notice and hearing violated the most fundamental principles of Anglo-American law.

The court's eloquent and majestic defense of the right of the trustees, the principal, and the deceased testator speaks for every testator, every trustee, and every principal. Even then, the court referred to its

duty to protect all trusts, including that of Stephen Girard. The court declared:

> "The beneficiaries in the Emaus Orphans' House are, doubtless, the orphan children to whom it is devoted; but, nevertheless, the trustees and principal have interests and franchises which are within the protection of the law. But as guardians of the trust, and dispensers of the charity, they are bound to attend to and protect the interests of the orphans, and the integrity of the will of the deceased. . . They were constituted the legal guardians of the estate, and were entitled to certain franchises, of all which they were deprived, without summons, hearing, or judgment, and by an act of the legislature, which, with regard to them, was rather a sentence of condemnation, than a law. . ." 6 Pa. 86, 93

These arguments apply with equal force to the attempt by the Orphans' Court to deprive the City of its authority to serve as trustee and to carry out its duties under the Acts of 1847 and 1853 to indenture the orphans admitted to Girard College and to serve as guardian of each such orphan.

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4. THE INDEPENDENCE OF PRIVATE CHARITIES IS NOT IMPAIRED

The Commonwealth has explicitly declared in every brief filed in this entire litigation that nothing in its position would interfere with or affect the right of a settlor, by will or inter vivos deed, to establish a

charity for segregated or sectarian purposes. It follows, of course, that such a will must be probated and that such a deed must be recorded. In these matters, as in all litigation involving private individuals, no rights under the Fourteenth Amendment are drawn into question merely by using the necessary machinery of the courts. In the Estate of Stephen Girard, it is the designation of the City as trustee and its continued operation of the College for over a century which brings into play the Fourteenth Amendment, not mere administration by the Orphans' Court.

CONCLUSION

The Commonwealth of Pennsylvania is a necessary and proper party. The action of the Orphans' Court in removing the City as Trustee solely for the purpose of permitting the exclusion of Negroes from an institution which has been publicly administered for over a century violates the Fourteenth Amendment.

Respectfully submitted,

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